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2   UNITED STATES DISTRICT COURT

3   EASTERN DISTRICT OF WASHINGTON

4   LINZEY SMITH,   )
)
5   Petitioner,   ) NO. CR-04-096-JLQ
) NO. CV-07-098-JLQ
6   vs.   )
) MEMORANDUM OPINION
7   ) AND ORDER DENYING
    UNITED STATES OF AMERICA,   ) PETITIONER'S PETITION FOR
8   ) WRIT OF HABEAS CORPUS
         Respondent.   )
9   _____   )

10   **Before the Court** is Petitioner's Petition for Writ of Habeas Corpus, heard

11 without oral argument on May 31, 2007. Petitioner is proceeding **pro se.**

12 Assistant United States Attorney Aine Ahmed represents Respondent. Having

13 reviewed the record, and being fully advised in this matter, **It Is Hereby Ordered**

14 that Petitioner's Petition for Writ of Habeas Corpus is **Denied** for the following

15 reasons.

16   On January 18, 2005, a jury convicted Mr. Smith of being a felon in

17 possession of a firearm in violation of 18 U.S.C. § 922(g). At the sentencing

18 hearing, held on April 13, 2005, the court found the Defendant had been convicted

19 of in excess of three violent felonies and was therefore an Armed Career Criminal

20 pursuant to 18 U. S. C, § 924(e)(1). The Defendant was sentenced to a term of 262

21 months imprisonment.

22   Mr. Smith contends that he received ineffective assistance of counsel and

23 should not have been found to be an Armed Career Criminal. It is his claim that

24 his attorney was ineffective in that he did not object to information in his Pre-

25 Sentence Report (PSR) that allegedly contained erroneous information about his

26 prior convictions and did not indicate the source of that information.

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1   To the contrary, at Mr. Smith's sentencing hearing, the court admitted the

2 Government's certified conviction reports for Mr. Smith. In accordance with

3 *Shephard v. United States,* 544 U.S.13 (2005), the court did not use any

4 documents outside the conviction documents, terms of any plea agreement, and

5 judicial records of colloquy between the sentencing judge and the Defendant when

6 assessing whether the prior convictions qualified as predicate offenses for purposes

7 of the Armed Career Criminal determination.

8   The first conviction was on a 1977 Missouri First Degree Robbery and

9 Assault With Intent to Kill With a Deadly Weapon charge. The Defendant admitted

10 that he was involved in the robbery and that he had pleaded guilty to robbery and

11 assault with intent to kill with a deadly weapon. Therefore, this court found that

12 this conviction was not in dispute and found that it qualified as a violent felony

13 conviction.

14   The second conviction was on a 1984 Washington charge of Burglary in the

15 Second Degree. The Defendant admitted that he had pleaded guilty to the burglary

16 of an Econo gas station and admitted that "I unlawfully entered the Econo Self

17 Service Station in Pasco, with intent to commit the crime of theft inside."

18 Cigarettes, beer, and a small safe were taken. The Defendant argued that his

19 burglaries could have taken place outside a building because a restaurant can be an

20 open air restaurant and service stations are not necessarily buildings. The court

21 rejected that claim and found that this conviction qualified as a violent felony

22 conviction.

23   The third conviction was a 1985 Washington conviction for Burglary in the

24 Second Degree. The Defendant admitted that he had pleaded guilty to theft from a

25 floor safe, among other things and that he entered Dave's Country Store to commit

26 a theft inside.   Therefore, this court found that this conviction qualified as a

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1 || violent felony conviction and that this third conviction for a violent felony resulted

2 || in Defendant being an Armed Career Criminal. However, there was more.

3 || A fourth conviction was on a 1987 Washington charge for First Degree

4 || Assault, based upon a robbery and assault with a knife. A jury had found him

5 || guilty of Assault in the First Degree. Therefore, this court found that this

6 || conviction qualified as a violent felony conviction.

7 || A fifth conviction was on a 1987 Washington charge for Burglary in the

8 || Second Degree, The Defendant stated that he "broke into the Red Steer without

9 || the owner's permission to steal what I could find of value." Therefore, this court

10 || found that this conviction also qualified as a violent felony conviction.

11 || On direct appeal, the Defendant argued that this court's determination that

12 || the second degree burglary convictions qualified him for Armed Career Criminal

13 || status was error. The Ninth Circuit disagreed:

14 || Smith admitted in his plea statement that he 'unlawfully entered the
      Econo Self Service Station in Pasco, with intent to commit the crime
15 || of theft *inside.*" The allegation of the Information and Smith's plea
      and plea statement thus were amply sufficient to establish that Smith
16 || was convicted of burglary of a building in the generic sense. The
      1984 conviction therefore serves as Smith's third violent offense, and
17 || we need not address his other convictions.

18 || *United States v. Smith,* 178 Fed. Appx. 773, 775 (9th Cir. 2006) (emphasis in

19 || original).

20 || A burglary means having the basic elements of unlawful or unprivileged

21 || entry into or remaining in, a building or structure, with the intent to commit a

22 || crime. *Taylor v. United States,* 467 U.S. 575 (1990). However Washington

23 || defines a building as including a fenced area, vehicle, railway car, or cargo

24 || container. R.C.W. § 9A.04.110. Therefore, the court must examine the charging

25 || document, terms of a plea agreement or transcript of colloquy between judge and

26 || defendant or some comparable judicial record of this information to determine

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1 whether a conviction qualifies as one supporting a finding of Armed Career

2 Criminal. This is precisely what happened in this case, and the finding that Mr.

3 Smith was an Armed Career Criminal was affirmed by the Ninth Circuit Court of

4 Appeals.

5   Mr. Smith contends that the United States did not produce a certified copy of

6 the Judgment for his conviction for First Degree Assault. However the United

7 States did produce a certified copy of the Information charging Defendant with

8 "intent to commit a felony upon the person or property of the one assaulted, and

9 did assault one Lester Mettling with a knife."

10   Petitioner also claims that his counsel was ineffective for not objecting that

11 this court used the 1988 Washington First Degree Assault statute as a basis for a

12 finding that it was a prior felony. Washington's First Degree Assault statute

13 R.C.W. 9A.36.010(a) was repealed in 1986 and re-codified at R,C.W. 9A.26.011

14 in 1988. The Defendant was convicted of this offense in February, 1987. This

15 court looked at R.C.W. 9A.26.011 to find that this was a violent felony. Had the

16 court looked at the repealed R.C.W. 9A.36.010 the finding would have been the

17 same. R.C.W. 9A.26.011 provides that a person is guilty of assault in the first

18 degree if he or she, with intent to inflict great bodily harm or death assaults another

19 and inflicts great bodily harm.

20   The repealed R.C.W. provided that a person is guilty of assault in the first

21 degree if he or she, with intent to inflict great bodily harm assaults another and

22 inflicts great bodily harm. Had counsel objected to this court looking at R.C.W.

23 9A.26.011, the court would simply have looked at the prior statute, R.C.W.

24 9A.36.010.   In either case intent to assault a person with a knife and in fact doing

25 so would be an assault in the first degree which is a violent felony, and a

26 conviction would count as a conviction under the Armed Career Criminal statute.

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1   There is not one shred of evidence that Mr. Smith received ineffective

2 assistance of counsel. There was simply no basis to object to the certified

3 conviction reports or the finding that Mr. Smith is an Armed Career

4 Criminal. Therefore, Mr. Smith's Petition for Writ of Habeas Corpus must be and

5 is **Denied.**

6   **IT IS SO ORDERED**. The Clerk is directed to enter this Order, enter

7 judgment denying the Petition For Writ of Habeas Corpus, forward copies to

8 Petitioner and to counsel for the Respondent,   and close both of the above-

9 numbered files.

10   **DATED** this 4th day of June, 2007.

11   s/ Justin L. Quackenbush
                        JUSTIN L. QUACKENBUSH
12   SENIOR UNITED STATES DISTRICT JUDGE

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